Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the Matter of	)	
	)	
Establishing Just and Reasonable Rates For Local Exchange Carriers	)	**WC Docket No. 07-135**
	)	
	)	

REPLY COMMENTS OF ALL AMERICAN TELEPHONE CO. INC., AVENTURE COMMUNICATIONS, GREAT LAKES COMMUNICATIONS, AND OMNITEL COMMUNICATIONS

Edward A. Yorkgitis, Jr.
Thomas W. Cohen
Kelley Drye & Warren LLP
3050 K Street NW, Suite 400
Washington, DC 20007
(202) 342-8400 (telephone)
(202) 342-8451 (facsimile)

Their Attorneys

January 16, 2008

TABLE OF CONTENTS

Page

SUMMARY

The initial comments make clear that the traffic provoking this rulemaking signifies the existence of substantial benefits to residential and business end users. All consumers of long-distance services benefit from the increased competition resulting from conference calling, chat line services, and other innovative offerings which the large interexchange carriers ("IXCs") and their affiliated incumbent local exchange carriers ("ILECs") seek to squelch. The imposition of onerous new rules upon competitive local exchange carriers ("CLECs") generally, or any distinct subset thereof, *i.e.,* rural CLECs, will only serve to chill competition and innovation, lessen public welfare, and entrench the IXCs and their affiliated ILEC operations.

Significantly, the current switched access tariffing regime applicable to CLECs was never designed to be cost-based. Indeed, CLECs have adopted a variety of approaches to implementing their network architectures such that generalizations regarding their cost structures are not even possible. Moreover there is less uniformity among CLECs than among ILECs, and CLEC costs are likely higher on average than those of their ILEC counterparts for a number of reasons.

The only response the Commission should consider to the alleged ills of so-called "traffic stimulation" is to encourage the play of market forces. In addition to negotiating switched access rates and terms with CLECs, IXCs can alter their end user rate structures, for example, by assessing usage-based charges to their subscribers above certain monthly traffic levels or by having pricing levels for different numbers of minutes. Before the IXCs can make a credible case that regulatory intervention is required, they should be required to exhaust their market-based responses. Further, once the Commission makes clear that it will rely on market

forces, for-fee conference calling providers are likely to respond with lower-priced or enhanced alternatives to free services, shifting access traffic to the large IXCs' ILEC affiliates.

Several commenters appropriately question the focus on the stated concerns of a few large IXCs with the access rates of a limited number of small carriers involving only a miniscule fraction of all interstate traffic. These parties urge the Commission not to introduce regulation through a special framework targeted to CLECs (or even rural CLECs) before larger issues regarding intercarrier compensation are addressed, if appropriate.

The initial comments contain a wide variety of proposed triggers by which ILECs *and CLECs* would be required to undertake a variety of regulatory obligations, most significantly filing revised tariffs. Adoption of a trigger applying to CLECs inherently assumes a cost-basis for access rates, a concept inapplicable to CLECs. Triggers by their nature would also be arbitrary, unsupportable, difficult to enforce with any fairness, and fail to account for myriad differences among CLECs and their individual circumstances. In addition, self-certification requirements of the sort discussed in the comments would be plagued with intractable definitional issues.

Finally, the "deemed lawful" provisions of the Act are deregulatory in nature, allowing for streamlined tariffing in certain instances, but also providing an opportunity for review by interested parties. It would be an improper use of the Commission's Section 10 forbearance authority for the Commission to decline to enforce the provisions of § 204(a)(3).

In sum, rather than adopt new regulations applicable to CLECs in this proceeding, the Commission should rely on the corrective capacity of market responses by IXCs and other entities. The Commission should also remind IXCs that, if they suspect a CLEC's tariffed rates are unjust or unreasonable, there are existing Commission procedures which allow the IXCs to address these concerns and which will appropriately take into account the specific facts and circumstances of the situation, something this generic proceeding could not purport to do.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the Matter of	)	
	)	
Establishing Just and Reasonable Rates For Local Exchange Carriers	)	**WC Docket No. 07-135**
	)	
	)	

REPLY COMMENTS OF ALL AMERICAN TELEPHONE CO. INC., AVENTURE COMMUNICATIONS, GREAT LAKES COMMUNICATIONS, AND OMNITEL COMMUNICATIONS

All American Telephone Co. Inc., Aventure Communications, Great Lakes Communications, and OmniTel Communications (collectively, the "Joint Rural CLEC Commenters"), through their undersigned counsel, hereby respectfully submit their reply comments to the Federal Communications Commission ("Commission") in response to the initial comments filed concerning the Notice of Proposed Rulemaking issued in the above-captioned proceeding.[1]

I. INTRODUCTION

The initial comments in this proceeding make clear that the traffic at issue reflects a benefit to both residential and business telecommunications customers. Although there are myriad reasons for increases in access traffic within a particular exchange or set of exchanges, the fact is plain that in each case growth is caused by the customers of interexchange carriers ("IXCs") using their long-distance service to make calls that they perceive to be of benefit.

---

1 *In the Matter Establishing Just and Reasonable Rates For Local Exchange Carriers,* Notice of Proposed Rulemaking, WC Docket No. 07-135, FCC 07-176. (rel. October 2, 2007) ("*NPRM*")

There is nothing artificial or fabricated about the establishment of a free conference calling service, a new call center, or the relocation of a business enterprise, to name a few examples of events stimulating traffic growth.[2] The record created by the initial comments underscores that calls made to such enterprises serve the needs of those who place the calls – the recipients are providing a service to the IXC customers placing the calls.[3]

The scenarios that have the large IXCs (in conjunction with their affiliated major incumbent local exchange carrier ("ILEC") operations) crying "foul" are evidence of innovative approaches to meet the needs of telecommunications users. These solutions are pro-competitive and pro-consumer.[4] The Joint Rural CLEC Commenters encourage these entities (and any others) so interested to make legitimate market responses to these arrangements. All consumers of long-distance services would benefit from the resulting increased competition, rather than from the imposition of onerous new regulations upon competitive local exchange carriers ("CLECs") or any distinct subset thereof, *i.e.,* rural CLECs, which will only serve to chill competition and innovation, lessen public welfare, and entrench the IXCs and their affiliated

2 In the unlikely event that access traffic is increased because of autodialing or some other ruse, the Commission should investigate and take appropriate action, of course.

3 *See* Comments of the Rural Iowa Independent Telephone Association at 3 (no matter the reason for the increased traffic, it "address[es] a market need" and reflects a benefit to the public); Comments of Global Conference Partners at 2 (the services at issue provide a "substantial public benefit" and respond to the "dearth of viable options)"; Comments of TC3 Telecom at 2-3 (conference calling and chat lines, no less than other reasons for increases in access traffic, constitute legitimate communications and bestow a significant benefit to customers of IXCs.)

4 By contrast, the regulations the IXCs seek to impose are unbalanced favoring the RBOCs and their IXC affiliates. *See* Comments of US TelePacific Corp. at 3; Comments of Hypercube/McLeodUSA at 12.

ILEC operations.[5] As several commenters assert, new and advanced telecommunications and information services should be encouraged.[6]

II. REREGULATION OF CLECS BASED ON CERTAIN COST ASSUMPTIONS WOULD REVERSE THE COMMISSION'S LONGSTANDING DEREGULATION OF ACCESS CHARGE RATES FOR CLECS AND ARE NOT JUSTIFIED IN ANY EVENT

Since the *Competitive Carrier* proceedings in the mid-1980s, the Commission has steadfastly declined to impose non-market regulation on competitive carriers. In those orders, the Commission streamlined the tariffing procedures for non-dominant carriers and paved the way for future non-cost-based regulation of CLECs. Following the passage of the Telecommunications Act of 1996, the Commission has not required CLECs to cost justify their services, including exchange access services, has permissively detariffed those services, and has generally relied upon market forces to shape the rates that CLECs assess for access services. In the *CLEC Access Reform Order,*[7] the Commission continued this trend by declining to impose any cost-based regulation – or attending concepts such as over earning – on competitive providers of access services, instead adopting benchmarking as a market-approximating check on CLEC rates.[8]

---

5 As in the initial comments of the Joint CLEC Commenters, in which the Joint Rural CLEC Commenters participated, these reply comments take no position on the propriety of additional regulatory obligations regarding so-called traffic stimulation as they apply to small or rural ILECs. However, the Joint Rural CLEC Commenters urge the Commission to consider carefully before it adopts any new regulatory requirements lest it stifle innovative and novel arrangements to meet consumer demands which could be adequately addressed by marketplace responses and existing procedures.

6 *E.g.* Comments of the Ohio Public Utilities Commission ("Ohio PUC") at 6-7; Comments of Western Telecommunications Alliance at 5.

7 *In the Matter of Access Charge Reform*, Seventh Report and Order, 16 FCC Rcd 9923 (2001) ("CLEC Access Reform Order").

8 *Id.* at 9938, 9940-41. The Commission noted the "extreme difficulty" of establishing access rates for CLECS. *Id.* at 9941. That earlier finding counsels extreme caution in establishing hard and fast rules about reasonableness in this rulemaking proceeding.

Significantly, then, the current regime applicable to CLECs – benchmarking – is not cost-based but rather based on a market paradigm.[9] As the rates of ILECs to which maximum CLEC rates are benchmarked decline, so too must CLEC rates, regardless of whether their own cost structures have changed or costs have declined. The only relief CLECs have to such extraneous limits being imposed is the marketplace response of negotiated rates with IXCs. Indeed, when, on reconsideration of the *CLEC Access Reform Order*, TDS sought the ability for CLECs to cost-justify higher rates – where benchmarked rates would not allow them to reasonably recover their costs and a reasonable amount of overhead and profit – the Commission pointedly declined to allow CLECs this opportunity.[10] In so doing, the Commission clearly signaled that it did not require CLEC rates to be related to costs but, ideally, the product of extraneous market forces.

In the *CLEC Access Reform* proceeding, the Commission never made a specific finding that the cost-structure of CLECs (let alone rural CLECs in particular) was similar to that of ILECs, whether in high-cost rural areas or otherwise. The benchmarking regime was not meant to reflect any such conclusions, and the Commission should not now, after twenty-plus years of going in the opposite direction, reintroduce the notion of cost-based rates for competitive carriers.

Because the Commission has never examined the costs of CLECs in their provision of local exchange, access, or any other type of service, Qwest's claim in its comments that that rural CLEC costs are more like the costs of non-rural ILECs is patently absurd and unsupportable.[11] Moreover, CLECs have adopted a variety of approaches to their network architectures such that

---

9 *Id.* at 9945, 9948 (goal of bringing CLEC rates toward a competitive market model).

10 In the Matter of *Access Charge Reform,* Fifth Order on Reconsideration, 19 FCC Rcd 9108, 9135-36 (2004).

11 *See* Comments of Qwest at 24-25.

generalizations are not even possible about their cost structures and costs. However, a few observations are in order: First, CLECs' switch costs are traffic sensitive – whether line-side or trunk side – and the marginal cost is not zero, as some of the IXCs contend or imply. Second, the incremental switch costs of any given CLEC is the result of many factors, such as equipment deployed and the particulars of switch vendor contracts, which are not monolithic. Third, as traffic grows, switch augmentations or additional switching equipment may be required, such that, in certain scenarios, incremental unit costs may well exceed average unit costs.[12] Fourth, CLECs often have traffic-sensitive costs not typically incurred by ILECs, such as collocation space and equipment and trunking between such leased spaces and their switches. Fifth, there is every reason to expect CLECs to have lower network utilization than ILECs. The initial comments explain further why the Commission would not be justified in drawing conclusions about the costs of CLECs based on ILEC experiences. There is less uniformity among CLECs than among ILECs, and CLEC costs are likely higher on average for a number of reasons.[13]

In short, there is no sound basis for the Commission to impose regulations on CLECs in general, or rural CLECs in particular, based on monolithic assumptions about their costs of service based on the networks and operations of their ILEC rivals. Not only would such measures be contrary to the deregulatory trends of the past two decades, but they have the clear potential to undermine competition in local markets that the Telecommunications Act of 1996 was meant to engender.

---

12 The Rural Alliance observes that the marginal or incremental costs of network switching or transport are not necessarily low and that Qwest's methodologies, as reflected in the Declaration included in the *Qwest v. Farmers and Mutual Telephone* complaint proceeding, are flawed in that respect. *See* Comments of the Rural Alliance at 14-17.

13 *See, e.g.,* Comments of Hypercube/McLeodUSA at 17-19; (CLECs lack economies of scale, experience lower levels of facilities, utilization and typically serve a sparser

. . .*Continued*

III. THE COMMISSION SHOULD GIVE MARKET FORCES THE OPPORTUNITY TO ADDRESS PERCEIVED CONCERNS ABOUT CLEC TRAFFIC STIMULATION

As noted above, the growth of traffic that has brought the IXCs running to the Commission demanding creation of a new regulatory framework is the result of market forces. The first response the Commission should consider, therefore, and the only one it should adopt at this time, is to encourage the play of market forces. Re-regulation of CLECs is not the only response now that the Commission has made abundantly clear that IXC self-help in the form of call blocking or withholding of payment for properly tariffed charges in inappropriate.[14] As an initial matter, the Commission should encourage CLECs and IXCs to reach contractual solutions to their disputes over access charges, including negotiated rates on a going forward basis. The IXCs, of course, are obligated to pay for the terminating access service provided by a LEC, and the Commission should discourage all efforts by IXCs to avoid their obligations, for example, by engaging in self-help.

Perhaps more importantly, the Commission should underscore that IXCs unilaterally hold important keys to addressing their perceived concerns. Before the IXCs can make a credible case that regulatory intervention is required, they should be required to exhaust their market-based responses. Specifically, IXCs can adjust their own interstate rates or rate structures to address the perceived problems.[15] As several parties note, the persistence of flat-rate service plans create the incentive for callers to use as many minutes of the service as possible, and contribute

---

customer base); Comments of Rural Independent Competitive Alliance at 5-6; Comments of Global Conference Partners at 23-24.

[14] *See* Comments of Joint CLEC Commenters at 3-4.

[15] *See* Comments of TC3 Telecom at 3-4.

significantly to the incentive to create conference calling and chat line arrangements.[16] The complaints of the IXCs are strong manifestations that many of their subscribers are taking advantage of these opportunities. To put it bluntly, IXCs and their customers are not "innocents" in all of this. Putting that reality aside, the IXCs stubbornly fail to recognize that there is a perfectly *legitimate* "self-help" response, namely requiring per minute charges above certain usage levels.[17] Another prospect, which is used by many mobile service providers, is to have different pricing plans depending upon the number of minutes customers expect to use (above which per minute calling applies). While these types of calling plans currently may not be widespread among wireline IXCs, they represent a perfectly legitimate and currently underutilized marketplace response.

Marketplace responses also can be expected on the service side. It is not clear that the supply of free conference calling and chat line services has reached a saturation point. Given the amount of demand that exists for better priced alternatives to existing IXC and major ILEC conference calling services, there is every reason to expect additional entries in this market, which is likely to spread the traffic to more and more LECs. As a result, the market will, in a manner of speaking, self-correct in reducing the levels of potential unit gain a LEC will enjoy from the increased traffic. Further, if the Commission makes clear that it will rely on market forces rather than new regulations, for-fee conference calling services are likely to respond as

---

16 *E.g.,* Comments of Leap Wireless at 4 (flat rate plans are a traffic stimulator); Comments of Cbeyond and Integra at 9 (same). By the same token, flat-rate pricing makes business sense because many subscribers, in reality, will *not* use enough minutes to justify their paying the set monthly fee.

17 As the Mercatus Center notes, it is perfectly reasonable to expect IXCs to recover from their customers that use their services. Comments of Mercatus Center at 2. *See also* Comments of Futurephone.com, LLC at 6-7 (IXCs should be able to identify and charge premiums for high calling volume lines); Comments of Global Conference Partners at 17-18 (IXCs have tools at their disposal to recover exchange access costs).

well with lower-priced or enhanced alternatives to free services, potentially shifting access traffic back to major ILECs.[18]

In short, the potential for market-based "solutions", including those solely within the hands of the IXCs themselves, counsel against a heavy-handed regulatory response. As such the IXCs' complaints that certain ILECs and CLECs are the cause of their problems – as if increased use of one's services is a problem – should fall on regulatory deaf ears.

Complementing any marketplace response, the results of which need not be intermediate or longer term in nature (as in the case of restructuring end user rates), the Commission should again emphasize the availability of its complaint procedures. Because the comments make clear that the concerns of the IXCs are limited to a relatively small number of carriers, the complaint procedures are ideally suited to address this situation to the extent market-based "solutions" cannot. The Joint Rural CLEC Commenters reiterate their initial comments on this point,[19] and note that numerous other parties echoed the soundness of relying on the complaint procedures.[20]

IV. IN ANY EVENT, THE COMMISISON SHOULD FIRST DETERMINE WHETHER AND WHAT MORE GENERIC INTERCARRIER COMPENSATION REFORM IS NECESSARY BEFORE FOCUSING ON NARROW ISSUES SUCH AS THOSE RAISED IN THE *NPRM*

A number of parties question the Commission's focus on the stated concerns of principally a few large IXCs with the access rates of a limited number of small ILECs and

---

18 *See* Comments of Global Conference Partners at 3 (IXCs should "offer the information services the public wants at reasonable process.") Notably, Verizon would allow for an exception from the regulations it proposes if the increase in traffic is "not traffic pumping related," demonstrating that its target in this proceeding is conference calling and other services that compete with its own similar, for-a-fee services, rather than allegedly unjust and unreasonable access charges. *See* Comments of Verizon at 3.

19 *See* Comments of Joint CLEC Commenters at 12-14.

20 *E.g.*, Comments of Alexicon at 6 (if the IXCs perceive that certain LECs are engaged in unlawful activity, they should be encouraged to use the Commission's complaint procedures); Comments of OPASTCO at 8; Comments of CenturyTel at 4-6.

CLECs. These parties urge the Commission not to introduce regulation through a special framework targeted to ILECS and CLECs (or even rural CLECs) while leaving the larger issues of intercarrier compensation unaddressed which have been pending in Docket No. 01-92 for almost six years.[21] The Joint Rural CLEC Commenters agree with those that have asserted that, only after the Commission decides whether and what global intercarrier compensation reform is necessary, should it consider addressing special cases such as traffic stimulation to the extent they persist and other market-based solutions, as outlined above, prove insufficient.[22]

The record indicates that the volume of conference calling, chat lines, and other services that are the target of the IXCs' concern is a miniscule fraction of all interstate calls.[23] As such, the attention being showered on the issue of traffic stimulation is disproportionate to the circumstances, and the traffic volumes are, relatively speaking, insufficient to warrant rule changes.[24] This is especially true, the Joint Rural CLEC Commenters submit, given the legitimate nature of this traffic and the existing availability of corrective action, rather than new

---

21 *See, e.g.,* Comments of National Cable and Telecommunications Association at 7-8; Comments of US TelePacific Corp. at 1-2.

22 *See, e.g.,* Comments of Chase Com *et al.* at 5-7.

23 For example, AT&T includes with its Comments an appendix showing that, in 2006, the total number of industry MOUs was 379 billion, and the number of 2006 USF Loops was 147 million. Comments of AT&T, Appendix B, p. 25. In its comments AT&T proposes 2000 average MOUs/per line/per month as the rural CLEC cut-off for a tariff refiling trigger. Comments of AT&T at 30. Examining the data provided by AT&T, those LECs whose average monthly MOUs exceeded 2000 minutes in 2006 account for only *4/10 one percent* of all traffic (1.6/379 billion). *See* Comments of AT&T, Appendix B, p.1. Even including all LECs whose average monthly MOUs exceed 1000 minutes – or one-half of AT&T is proposed trigger – accounts for less the *6/10 of one percent* of all 2006 traffic (2.2/379 billion). *Id.*

24 *See* Comments of Rural Iowa Independents at 2; Comments of CenturyTel at 4, 9; Comments of Alexicon Telecommunications Consulting ("Alexicon") at 6 (no statistically significant number of potential abuses have been shown).

rules, as outlined above.[25] Rather, the Commission's resources would be better focused, as numerous commenters contend, on more generic issues for which there may be no current marketplace- or complaint-based responses available, such as "phantom traffic" and the going forward regulatory treatment of VoIP.[26]

V. IXC CONTENTIONS THAT A SUBSET OF THEIR CUSTOMERS ARE BEING IMPROPERLY SUBSIDIZED BY OTHERS ARE WITHOUT MERIT

Qwest and other IXCs contend that so-called traffic stimulation through free conference calling, chat lines, and other services causes the majority of their interexchange subscribers to effectively subsidize the subset of their customers that use the services.[27] This contention is without merit and does not provide any support for the onerous regulations the IXCs seek to impose on CLECs.

Any end user can access and utilize the free conferencing and other services that are the target of the IXCs in this matter. Moreover, such so-called subsidization is a common consequence of flat-rate pricing practices and geographically averaged interexchange rates. With

---

25 The Joint Rural CLEC Commenters note that the IXC commenters do not make a case that their profitability is adversely impacted by the traffic stimulation activity of which they complain. It is not surprising that they fail to do so for a variety of reasons. One, as noted above, only a very small amount of total interstate traffic is at stake. Two, at least one commenter reports that the FCC's own recent studies indicate that the IXCs' effective per minute interstate rate is up to 6 cents a minute, even with flat rate calling. *See, e.g.,* Comments of Global Conference Partners at 18. This is substantially more than typical CLEC (or ILEC) access rates permitted under current rules. Three, as discussed herein, as a general matter, the increased interexchange traffic is an opportunity for IXCs to increase their revenues.

26 *E.g.,* Comments of Embarq at 4, 15; Comments of Independent Telephone. & Telecommunications. Alliance at iii, 15-16; Comments of Texas Statewide Tel. Coop. at 2; Comments of Western Telecom Alliance at 3). *See also* Comments of Global Conference Partners at 20 (addressing special access is of greater import than addressing traffic stimulation). The Joint Rural CLEC Commenters do not necessarily share the positions of these parties on resolving these other intercarrier compensation issues and reserve the right to address them finally in appropriate fora.

flat rate prices, some users will make fewer calls than average, while others will make many more calls. Because each pays the same, under the IXCs' argument, those who use the service less frequently are subsidizing the others. This reality has nothing to do with the existence of free conferencing or any other service end users might enjoy (and IXCs may choose to attack). Moreover, interstate calls between certain points of the country are less costly than others. Yet, if all minutes under certain nationally available pricing plans are charged to customers at the same rate regardless of location (under Section 254(g) of the Act), then some end users, in effect, will be subsidizing others.[28] This technical instance of cross-subsidization fails to invalidate flat-rate pricing as a policy matter, just as the heavier use of conferencing services or chat lines by some IXC customers fails to invalidate the access charges that terminating LECs assess when those customers use interexchange services.

VI. MARKETING EFFORTS OF CARRIERS SHOULD NOT BE SUBJECT TO SCRUTINY

Some of the IXCs ask the Commission to regulate the arrangements that CLECs reach with their end user customers.[29] The Joint Rural CLEC Commenters submit that this would be inappropriate and is a red herring in any event. As several commenters explain, the manner in which a carrier attempts to stimulate use of its network facilities is a legitimate cost of doing business.[30] This especially applies when the "stimulated" traffic in question is originated by

27 Comments of Qwest at 11; *see also* Comments of AT&T at 18.

28 As Hypercube notes, even volume discounts are a form of traffic stimulation and involve a certain degree of subsidization of one group of customers (those who do not receive volume discounts) by others (those taking the discounts). Comments of Hypercube/McLeodUSA at 5.

29 Comments of Qwest at 15-17; Comments of AT&T at 32-34.

30 Comments of Iowa Telecom Association at 7-8; Comments of Texas Statewide Telephone Cooperative at 3 (Compensation for business arrangements not included in a carriers revenue requirement should not be subject to Commission review).

. . .*Continued*

disinterested end users, as in the case of conference calling, chat lines, IP-enabled international traffic, and so forth. Similarly, successful efforts to win a call center account will stimulate significant terminating access minutes for a LEC, none of the traffic being generated by the new customer. The manner in which a LEC might win such a customer should not, as a general matter, be of interest or concern to regulators whether it involves discounted rates, commissions, or other incentives. The same is true regarding conference calling companies, chat line providers, or other end users regardless of what service they may provide over their access lines.[31]

In brief, how traffic is encouraged simply should not come into play when the traffic is generated by legitimate consumer or business activities.[32] Because conference calling companies and chat lines, for example, serve a legitimate public demand, Qwest is simply off-base when it seeks pejoratively to brand traffic stimulation from such operations as "artificial stimulation."[33] In any event, the record is clear that there is nothing inherently unlawful or unreasonable about marketing fees and commissions to customers that bring or stimulate legitimate traffic. As the Ohio PUC observes, a restrictive view regarding permissible marketing fees would only serve to chill innovative approaches to generate additional use of network facilities.[34]

---

31 As the Rural Iowa Independent Telephone Association observe, the motive of the end users and the destination of the traffic should *not* be injected into the discussion. Comments of Rural Iowa Independent Telephone Association at 2-3.

32 Comments of TEXALTEL at 2-3.

33 Comments of Qwest at 17.

34 Comments of the Ohio PUC at 6-7.

VII. VARIOUS TRIGGERS AND OTHER MEASURES PROPOSED BY THE IXCS ARE ARBITRARY AND SHOULD BE REJECTED

As discussed above, and explained in the initial comments of the Joint CLEC Commenters, the Commission need not and should not adopt new regulatory requirements to be applied against CLECs. Moreover, the various solutions proposed by the proponents of new regulations are ill-advised and deficient.

The initial comments contain a wide variety of proposed triggers by which ILECs *and CLECs* would be required to undertake a variety of regulatory obligations, most significantly to file revised tariffs. Adoption of a trigger that would apply to CLECs is predicated on the notion of a cost-basis for access rates and the principle of over earning, neither of which is applicable to CLECs as discussed earlier. Apart from this fundamental flaw, triggers by their nature would be arbitrary and unsupportable. These severally proposed triggers are based upon average numbers of MOUs per access line, percentage increases in traffic, entering into agreements with "traffic stimulators," among other variations. Any such triggers are arbitrary, and they would be difficult to enforce, as the Mercatus Center correctly observes.[35] Leap Wireless acknowledges that growth rate triggers would do little more than increase regulatory requirements and resultant carrier and agency costs *with minimal corresponding benefit*.[36]

Moreover, because of their arbitrary nature and the one-size fits all approach that the IXCs propose – although, notably, there is little uniformity in their proposed solutions – the triggers being advocated would violate carriers' due process rights. In particular, the FCC's long-standing framework is that tariffs are carrier initiated, and when they are filed, the Commission has well-established mechanisms to alter them consistent with due process rights,

---

[35] Comments of the Mercatus Center at 1-2.

[36] Comments of Leap Wireless at 10.

and not by employing arbitrary automatic or constructive triggers.[37] Thus, the Act and the Commission's regulations allow for suspensions and investigations before a tariff takes effect, as well as complaints after they take effect. There is no reason to alter this basic approach. Adoption of any of the proposed triggers would force a change upon CLECs that would undermine the soundness of the current deregulatory regime.[38]

As Hypercube argues, there are numerous problems with one-size-fits-all triggers because of myriad potential differences among CLECs and, thus, between one situation of traffic growth or high traffic volumes and the next.[39] CLECs and circumstances involving their traffic growth might vary in numerous ways, each of which alone and together in combination would be relevant in assessing the reasonableness of its rates were the Commission to depart (unwisely, the Joint Rural CLEC Commenters submit) from the current regulatory framework applicable to CLEC access charges. For example, the scale of different CLECs (number and concentration of access lines, size and density of the territory served, plant and network deployment) will vary significantly.[40] The reasons for any recent growth is also likely to differ.[41] Business plans of CLECs are extremely diverse[42]. Moreover, the costs of CLECs to provide their services will likely be highly variable, with the relationship between costs and volume of traffic not always

---

37 *E.g.* Comments of CenturyTel at 4-6, 7-8; *see also* Comments of Alexicon at 6.

38 In the event the Commission does adopt triggers, which it should not, they must be bi-directional. When the conditions requiring the trigger are no longer present, the CLEC should be able to promptly revise its tariff back in "the original direction." *See* Comments of TEXALTEL at 4.

39 Comments of Hypercube/McLeodUSA at 17.

40 *See* Comments of Texas Statewide Tel. Cooperative at 5. While the Joint Rural CLEC Commenters oppose the triggers proposed by this commenter, they note the Texas Statewide Telephone Cooperative's observation that there are "vast differences in ILECS" (*id.*). The same is true for CLECs.

41 *See, e.g.,* Comments of OPASTCO at 9-10.

42 *See, e.g.,* U.S. TelePacific Corp. at 6-7.

clear.[43] Further, differences will occur in the time periods over which the growth occurs, which could have ramifications for the propriety of any regulatory changes and the burdens associated therewith.[44] In short, any one-size fits all regulation will almost continually be arbitrary.[45] For this reason, even an advocate of new regulation, such as Embarq, emphasizes the need for the Commission to adopt a waiver process if it establishes a new regulatory framework based on triggers in this docket underscoring the inherent short-comings of any one-size-fits-all approach.[46]

---

43 Comments of Alexicon at 3 (not always clear when costs increase on either a proportional or non-proportional basis); *see also* Comments of TEXALTEL at 4 (per minute cost charge of small rural carriers not as great "as one might initially think").

44 Accordingly, there are a variety of positions in the record regarding the period of time over which measurements should be made for the purposes of any trigger to file revised tariffs or adhere to specific other obligations. As the Joint CLEC Commenters noted, the time periods, if any, that are adopted should be at least six months, and preferably twelve months. Comments of Joint CLEC Commenters at 7 n. 10.

45 Conversely, it is not apparent to the Joint Rural CLEC Commenters why price cap carriers do not have the same motives to engage in so-called "traffic-pumping" as do any other LEC. Consequently, while the Commission should not adopt any new regulations, if it does adopt new regulations applicable to CLECs, rather than leave price cap carriers alone, as Embarq advocates (Comments of Embarq at 14), all local carriers should be subject to any new regulations, as advocated by Cbeyond. Comments of Cbeyond and Integra at 7-8. Otherwise, price cap carriers alone may have the ability to earn "unlimited earnings for switched access." *See* U.S. TelePacific Corp. at 3.

46 Comments of Embarq at 3-4, 9. While the Joint Rural CLEC Commenters disagree with the proposed adoption of triggers, if the agency adapts triggers, it is vital that the Commission have a waiver process to allow a CLEC to demonstrate why a revised tariff filing is not appropriate in its case. Moreover, as Hypercube suggests, there is no basis for triggers for CLECs that benchmark to non-rural ILECs. Comments of Hypercube/McLeodUSA at 19. But, in any event, under any framework the FCC might adopt, rural CLECs should always be able to charge at least the lowest NECA band rates or, depending on where the CLEC operates, the rate of price cap carriers. *Accord* Comments of USTA at 8-9.

In addition to the inherently arbitrary nature of triggers, certification requirements would be fraught with intractable definitional issues as numerous parties explain.[47] For example, a sufficiently clear definition of what (if anything) is impermissible "traffic stimulation" versus allowable growth has not been set forth in any regulation advocate's comments. Yet self-certification would require unambiguous terms if it is not to be unduly burdensome and chilling. The Commission should be particularly wary of definitions proffered by large IXCs that merely reflect their way of doing business and that of their ILEC affiliates. Further, while entering into a traffic stimulation agreement should not be a trigger for reporting or self-certification, which USTA acknowledges,[48] if it were, it may be problematic for CLECs to ascertain in all cases whether they have triggered any such requirement.[49] Moreover, and for similar reasons, certification requirements and other regulations based upon the identity of a LEC's customers should be avoided, as argued by Chase Com *et al.*[50]

Finally, as noted in the initial comments of the Joint CLEC Commenters, the Commission has left no room for doubt that self-help remedies by IXCs are improper and unlawful whenever an interexchange carrier has a complaint about a LEC's access charges.[51] Consequently, the Commission should flatly reject Qwest's and the Mercatus Center's surprising

---

47 *See* Comments of Hypercube/McLeodUSA at 20; Comments of US TelePacific Corp. at 3-4; Comments of NTCA at 7-8 (definitions needed so companies will "understand the extent and meaning of self-certification.")

48 Comments of USTA at 6-7 (merely entering into an agreement does not mean that traffic will necessarily be stimulated to any degree).

49 Comments of Rural Independent Competitive Alliance at 9-10 (AT&T and Verizon have failed to show any particular traffic volume is unlawful, and Verizon's ILEC-traffic-volume benchmarking proposal puts CLEC in position of never knowing when it is a violation).

50 Comments of Chase Com *et al.* at 8-9.

51 Comments of the Joint CLEC Commenters at 14; *accord, e.g.,* Comments of Global Conference Partners at 12-14.

requests for any sort of green light that would allow IXCs to recommence call-blocking or other self-help activities.[52] Such activities, if allowed, would cause considerable harm to telecommunications users and undermine the integrity of the public switchboard telephone network. Rather than put enforcement into the hands of the RBOCS and their IXC affiliates, the Commission should underscore the IXCs' ability, consistent with the Commission's rules, to file formal complaints or requests for investigation -- or judicial actions -- if they believe that one or more specific LECs are engaged in improper practices or charging unlawful rates, whether involving increases of traffic or any other circumstances. Having said that, the Joint Rural CLEC Commenters' provision of terminating access services to IXCs pursuant to their lawfully filed tariffs and the Commission's benchmarking rules have been lawful, just and reasonable and they fully reserve their rights to make such demonstrations should any IXCs bring a complaint against them, as well in any court complaints that remain pending.

VIII. THE COMMISSION SHOULD NOT AND CANNOT FORBEAR FROM ENFORCING SECTION 204(A)(3) OF THE ACT

The "deemed lawful" provisions of the Act, 47 U.S.C. § 204(a)(3), are deregulatory in nature, allowing for streamlined tariffing in certain instances, but still providing an opportunity for review by interested parties. As such, it would be an improper use of the Commission's Section 10 forbearance authority for the Commission to decline to enforce the provisions of Section 204(a)(3). Were the Commission to forbear and, instead, impose more onerous regulations when the Congress has already specifically provided for streamlined tariffing and presumptions of lawfulness, it would turn the intended uses of forbearance authority on their heads – essentially, allowing the Commission to eliminate a Congressionally adopted framework and to impose that of its own devising, even if more onerous (which it would be in this case).

---

52 Comments of Qwest at 1b, 31; Comments of Mercatus Center at 9.

Consequently, it is not surprising that a number of parties, which the Joint Rural CLEC Commenters join, argue against any consideration of applying the Commission's forbearance powers in this instance which would eliminate the "deemed lawful" provisions of Section 204(a)(3) for some or all LECs.[53]

Further, as described above, as a matter of policy, the Commission should not adopt any growth-related triggers requiring the refiling of revised tariffs. Equally important, growth-triggered refiling requirements would also run contrary to Section 204(a)(3) and operate as a sort of back-door forbearance. "Deemed lawful" status is created at the time the tariff is filed, and protects a tariff from retroactive challenges. If a carrier with a deemed lawful tariff is required to refile without a specific finding after an opportunity for a hearing that its rates or other provisions of the tariff are unlawful, then the Commission would in essence have wiped away the presumption created by the statutory "deemed lawful" provision.[54] As discussed earlier, any growth-related triggers will, by necessity, be arbitrary and should not be adopted. If they are nonetheless adopted, they should be accompanied by clear waiver procedures to allow LECs to argue their application in a particular instance in improper. However, even that sort of addition would not likely save the trigger provision because the "deemed lawful" nature of the tariff will have evaporated for all practical purposes, even if the waiver is granted, because the burden will have shifted to the tariffing carrier, eliminating entirely the presumption of lawfulness. Instead

---

53 See, *e.g.*, Comments of John Starlaukis at 20; Comments of USTA at 2 (such forbearance would be "overkill"); Comments of OPASTCO at 6-7; Comments of the Ohio PUC at 12-13 (Forbearance would create considerable uncertainty for small carriers); Comments of Embarq at 11; Comments of NECA at 12-13 (Forbearance designed to reduce regulatory burdens, not increase them.)

54 *Accord* Comments of CenturyTel at 6-7; Comments of Independent Tel. & Tel. Alliance at 13.

of establishing growth triggers imposing automatic refiling obligations on CLECs, the Commission should rely on its existing procedures regarding complaints and investigations.

IX. CONCLUSION

For the foregoing reasons, the Commission should refrain from adopting new regulations applicable to CLECs or, more particularly, rural CLECs regarding so-called traffic stimulation activities. Rather, the Commission should reiterate that, in the event that an IXC believes that a CLEC is engaging in an unjust, unreasonable, or unreasonably discriminatory practice, it is able to avail itself of the Commission's existing investigation and complaint procedures.

Respectfully submitted,

Edward A. Yorkgitis, Jr.
Thomas W. Cohen
KELLEY DRYE & WARREN LLP
3050 K Street NW, Suite 400
Washington, D.C. 20007
(202) 342-8400 (telephone)
(202) 342-8451 (facsimile)

Attorneys for
All American Telephone Co. Inc.,
Aventure Communications,
Great Lakes Communications,
and OmniTel Communications

January 16, 2008